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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 424

EDWARD E. JENKINS, RECEIVER OF THE NATIONAL CITY BANK OF SALT LAKE CITY, UTAH, ET AL., PETITIONER,

vs.

NATIONAL SURETY COMPANY OF NEW YORK, RESPONDENT.

BRIEF OF JOSEPH W. McINTOSH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, AS AMICUS CURIÆ, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Comes now Joseph W. McIntosh, Comptroller of the Currency of the United States, who is charged by law with the supervision of receivers of insolvent national banks, and with the disbursement of moneys in the administration of insolvent national banks, and, by

leave of court first had and obtained, respectfully submits his brief, as *amicus curiæ,* in support of the petition for certiorari heretofore filed in the above entitled cause.

Opinions of the Courts Below.

The decree of the United States District Court for the District of Utah in this case will be found at page 51 of the record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit, reversing the decree of the district court, appears at page 232 thereof, and is reported in 18 Fed. (2d). 707.

The decree of the district court in the first case between these same parties, and relating to the same subject-matter, to which frequent reference will be made, appears at page 107 of the record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit affirming that decree appears at page 110 thereof, and is reported in 5 Fed. (2d), 34.

Jurisdiction.

The opinion of the circuit court of appeals in the instant case was entered March 28, 1927, petition for rehearing was filed in due course, and rehearing denied June 14, 1927.

No question of jurisdiction was raised in the courts below.

Jurisdiction by this Court is invoked under Section 240(*a*) of the Judicial Code, as amended by the Act of February 13, 1925 (C. 229; 43 Stat., 936, 938).

Issues.

It will be conducive to a better appreciation of the facts to state, at the outset, the issues involved. They are as follows:

1. Did the court err in holding that the National Surety Company, which had paid a depositor of the National City Bank of Salt Lake City $125,000 as the penalty of its depository bond insuring payment of the entire deposit, was entitled to prove a claim for $120,000 ($5,000 had been assigned to the American Indemnity Company) against the receiver of the bank as a general creditor, with the right of receiving past and future dividends thereon ratably with other creditors, before the depositor so indemnified had received dividend payments from the receiver of the balance of his deposit, the said claim of the Surety Company being based upon a provision in the application of the bank, as principal, to the Surety Company, for said bond; whereby the bank agreed to indemnify the Surety Company from loss on said bond, the depositor not being a party to said application-contract, and the bond containing no provision bearing thereon?

2. Did the court err in holding that the matters in issue were not *res judicata?*

Basis of Petition for Certiorari.

(*a*) The decision of the circuit court of appeals in the instant case is in "conflict with the decision of another circuit court of appeals on the same matter

(Rule 35, par. 5(*b*), Revised Rules of the Supreme Court of the United States. See Beechnut Packing Company *vs.* Lorillard, 273 U. S., 629, granting certiorari on this ground)."

As will more fully hereafter be indicated, the decision in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of Maryland Casualty Company *vs.* Fouts *et al.*, 11 Fed (2d), 71, dealing with a similar question.

(*b*) The circuit court of appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. (Rule 35, par. 5(*b*), Revised Rules of the Supreme Court of the United States.)

The decision involves the administration by the Comptroller of the Currency of the United States of the national banking law, in connection with the winding up of insolvent national banks, and the distribution by him of "ratable" dividends to the creditors of such banks as provided in Sections 5234 and 5236 of the United States Revised Statutes and amendatory acts. The existing conflict of appellate decisions renders uncertain the course the Comptroller should follow in existing and future cases.

Statement of Facts.

The facts, so far as the issues here involved are concerned, are not disputed. As already indicated, the same parties have had two controversies concerning

the subject-matter, and one of the issues now before the court is that of *res judicata.*

First Case.

E. J. Grosebeck, as Treasurer of Salt Lake County, qualified for office by giving bond for $200,000 to the county, with the American Surety Company as surety, conditioned, *inter alia,* upon the safekeeping of the county funds. The statutes of Utah *permitted* deposit of funds in a bank, prescribed the conditions under which such deposit should be made, but even if so deposited, the Treasurer remained primarily responsible to the county. (Construction of the State statute by the circuit court of appeals in the first suit—National Surety Company *vs.* Salt Lake County *et al.,* 5 Fed. (2d), 34, 36.) Grosebeck arranged to deposit in the National City Bank of Salt Lake City. To protect his deposit the bank, as principal, executed three surety bonds running to Grosebeck, one of the National Surety Company for $125,000; one of the Fidelity and Deposit Company of Maryland for $75,000; and one of the Massachusetts Bonding and Insurance Company for $25,000; total $225,000. In addition, the bank pledged with him bonds of the Crystal Lake Farms Company of the par value of $360,000. In its applications for these bonds, the bank agreed to indemnify and save the Companies harmless and free from loss. The bond of the Fidelity and Deposit Company contained a provision, not in the other bonds, giving the Company immediate subrogation for the amount of its penalty. That Company is not involved in this suit.

The Massachusetts Bonding and Insurance Company, although made a party by interpleader in the first action, did not continue to participate in the litigation and is now out of the case. The bond of the National Surety Company was conditioned that the bank

> "well and truly keep all sums of money so deposited or to be deposited * * * and * * * pay over the same * * * and * * * in all respects save and keep the said E. J. Grosebeck, Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits * * *."

The bank failed January 17, 1922, and Edward E. Jenkins was appointed Receiver, and is still acting as such. At the date of suspension Grosebeck, as Treasurer, had on deposit, $643,094.29. The county was reimbursed in full: by the direct payment of $200,000 by the American Surety Company on its bond of Grosebeck; by the payment on the depository bonds, through Grosebeck, Treasurer, obligee, of $125,000 by the National Surety Company, $75,000 by the Fidelity and Deposit Company, and $25,000 by the Massachusetts Bonding and Insurance Company, total $425,000; and by the payment of $218,094.29, in two dividends, from the receiver of the bank through Grosebeck; total, $643,094.29. In this situation, although the County had been made whole, it will be noted that Grosebeck still had approximately $400,000 due him as a depositor. The second of the foregoing dividends exceeded by $9,143.41 the amount necessary to reimburse the County, and, therefore, left such sum of $9,143.41

available for reimbursement of such Surety Company as might be entitled thereto by subrogation or otherwise. Grosebeck had assigned to the American Surety Company $200,000 of his depositary claim (he had, in his application, agreed to indemnify the Bonding Company and save it harmless) upon the payment by the American Surety Company of the amount called for in its bond to the County. Thereupon, to determine the right to said sum of $9,143.41, and to future dividends, and to said Crystal Lake Farms Company bonds, the American Surety Company and Grosebeck sued the receiver, claiming the right to all dividends until such time as both should be made whole. (Record, 73-77; also see National Surety Company *vs.* Salt Lake County *et al.*, 5 Fed. (2d), 34, summarizing the facts in the first case.)

Upon the answer and prayer of the receiver (Record 80-84), the court required interpleader of the National Surety Company, the Massachusetts Bonding and Insurance Company, and the American Indemnity Company (assignee to the extent of $5,000 of the claim of the National Surety Company). The response of the National Surety Company set forth a claim of prior right to both past and future dividends, based upon: (1) subrogation, as the result of the payment by it of its depository bond, and (2) reimbursement in the amount of $120,000 alleged to be due it from the bank upon the indemnity provisions of the application of the bank for the bond. (Record 91-92.) The National Surety Company thereupon prayed for the allowance of its claim of subrogation (Prayer No. 4, Record 92),

and allowance of its claim of $120,000 as a general creditor, with the right of dividends ratably with other creditors, based upon its indemnity contract (Prayer No. 5, Record 92). The contentions and claims of the National Surety Company thus set forth were put in issue by the reply of the American Surety Company to said contentions and claims. (Record 95-98.)

The case went to trial upon the issues so created and the trial court held that the American Surety Company had priority in the dividends until it should be made whole, and that the National Surety Company should be postponed as to all dividends until the American Surety Company had received payment in full (Record 107). The trial court was affirmed on appeal. (National Surety Company *vs.* Salt Lake County, 5 Fed. (2d), 34, 35.)

Second Case.

Thereafter the National Surety Company filed the instant case against the receiver, setting up the indemnity provisions contained in the application of the bank for said $125,000 bond, and prayed for the allowance of its claim of $120,000 as a general creditor of the bank, with the right to draw dividends ratably with other creditors. A copy of said application was attached to the bill of complaint as an exhibit (Record, 1-11). Upon the answer and prayer of the receiver, Grosebeck and the American Surety Company were interpleaded, issue was joined, and the trial court held that the issues had been adjudicated in the prior suit; that the claim of the National Surety Company should be allowed and approved, but subject to the

prior right of the American Surety Company to receive sufficient dividends to be made whole, as provided in the decree in the former case, and that the allowance of the claim of the National Surety Company should not affect the existing basis of payment of dividends to the general creditors (Record, 51). Upon appeal, the circuit court of appeals held that the issues were not *res judicata*, allowed the claim of the National Surety Company for $120,000, reversed the decree of the trial court, and directed the trial court to enter a decree requiring the receiver to allow the claim of the National Surety Company upon its indemnity contract as a general creditor, and to pay dividends thereon pro rata with other general creditors, *including the dividends theretofore paid to general creditors.* (Record, 232; National Surety Company *vs.* Jenkins, 18 Fed. (2d), 707.)

ARGUMENT.

I.

The court did err in holding that the National Surety Company—which had paid a depositor of the National City Bank of Salt Lake City $125,000 as the penalty of its depository bond insuring payment of the entire deposit—was entitled to prove a claim for $120,000 ($5,000 had been assigned to the American Indemnity Company) against the receiver of the bank as a general creditor (with the right of receiving past and future dividends thereon ratably with other creditors), before the depositor so indemnified had received dividend payments from the

receiver of the balance of his deposit, the said claim of the Surety Company being based upon a provision in the application of the bank, as principal, to the Surety Company, for said bond, whereby the bank agreed to indemnify the Surety Company from loss on said bond, the depositor not being a party to said application-contract, and the bond containing no provision bearing thereon.

The circuit court of appeals held in this connection in the instant case that the National Surety Company was a creditor by reason of the indemnity provisions in the bank's application for bond, and was entitled to prove its claim for $120,000 as a general creditor, and to receive dividends ratably thereon with other creditors, including an amount equivalent to the dividend theretofore declared as to other creditors, and overruled the opposing contentions that the allowance of said claim and the payment of dividends thereon would be the payment of the surety at the expense and loss of the depositor whom it had indemnified, before said depositor had been made whole and, therefore, while the condition of the bond—that the bank should well and truly pay "all" sums of money deposited—was still unperformed and the obligation of the bond therefore still in force.

The court devoted the major portion of its opinion to the discussion of the *res judicata* issue and disposed of the indemnity issue by citing and relying upon the Centropolis Bank case, *infra*, in the eighth circuit.

In United States Fidelity and Guaranty Company *vs.* Centropolis Bank, 17 Fed. (2), 913, the case thus

relied upon, it appears that the Surety Company gave a depository bond of $50,000 with the bank as principal to secure a county deposit. The bank failed and the Surety paid the county and then filed its claim of $50,000 with the State Commissioner of Finance, relying upon an indemnity contract similar to the one in the instant case. The Commissioner rejected the claim and the Surety filed suit to establish its claim and that it be decreed to have the right to share ratably with other general creditors in the distribution of dividends from the bank. The trial court held that the Surety Company was entitled neither to subrogation nor to dividends upon its indemnity claim, inasmuch as the county had not been paid in full from the dividends of the bank. It further held that although the Surety Company was entitled to have its indemnity claim allowed, it should not receive dividends thereon until the county had been paid in full. The circuit court of appeals affirmed the trial court as to its ruling upon the matter of subrogation, but reversed it as to the indemnity claim and held that the Surety was entitled to the allowance of its indemnity claim of $50,000 and to dividends thereon ratably with other creditors.

The primary basis of the court's decision in the Centropolis case was the so-called "relation back" doctrine, whereby a surety, whether by express indemnity agreement, or the indemnity implied by law from his principal, is entitled to a claim against his principal for the amount of loss sustained by him in the performance of his bond, and that upon the execution of the bond by the surety, the relation of debtor

and creditor immediately arises, prior to performance of the bond, and that inasmuch as the relation of debtor and creditor thus arose prior to the insolvency of the bank, the surety was entitled to file its claim with other creditors whose claims originated prior to the insolvency.

Assuming, for discussion only, the existence of the "relation back" rule, it would seem obvious that the rule cannot be permitted to work an injustice by depriving the depositor thus insured of any remedies which he might have against his debtor, nor can it affect the independent contract, represented by the bond, existing between him on the one hand and the bank and the surety on the other. It is no longer open to question, in view of decisions such as Merrill *vs.* National Bank of Jacksonville, 173 U. S., 131, that a creditor is not deprived of his remedies against the debtor by reason of the fact that he may have either collaterals or other security for the payment of the debt, and that such creditor is entitled to receive payment from the debtor, by way of dividends or otherwise, regardless of what he may collect from the surety or collaterals, until the amounts received by him from the debtor and from the collaterals or surety have made him whole. The creditors in the instant case, Grosebeck and his assignee, the American Surety Company, are entitled to receive dividends from the assets of the bank without diminution thereof by way of payments to the surety to reimburse him for the very indebtedness which he contracted to assume, as such course would take from the depositor part of the assets upon which he had a right to rely for collection. To

hold, on the one hand, that the surety is not entitled to subrogation where the creditor has not been paid in full, even though the surety may have paid the full penalty of his bond, on the theory that it would be inequitable to permit the surety to compete with his obligee, and take from the obligee, to the latter's prejudice, securities or rights in which the obligee is still interested, and on the other hand, to permit that same surety in that same transaction, to receive dividends upon an indemnity claim growing out of the very indebtedness which he indemnified, is, in actual effect, subrogation, although in a lesser degree, for the reason that it takes from the obligee a proportionate share of dividends which he would otherwise receive. The assets of the estate would open up in such case, to permit the participation of the surety, at the expense of the obligee.

A further consequence of allowing such indemnity claim, and dividends thereon, is the virtual abrogation, *pro tanto*, of the depository bond-contract between the surety and the bank on the one hand, and the depositor on the other hand, by subjecting such contract to the terms of the express or implied indemnity contract existing only between the bank and the surety, without the consent of the depositor-obligee or his participation in said indemnity contract. The bond-contract was that the bank would repay all deposits and the surety guaranteed that such would be done, and under the equitable doctrines governing subrogation, the surety cannot participate by subrogation until his obligee has been paid in full. Such principle becomes part of the bond-contract by operation of law. The

effect of the indemnity contract, if allowed, would be to require the bank, not to repay all of the deposit before the surety should obtain anything by way of reimbursement, but that the bank should repay the deposit subject to the right in the surety company to receive part of that deposit by way of dividends, before the depositor shall have been paid in full. It is not reasonable to hold that the depositor's contractual rights can be thus changed without his consent. It is to be noted, in this connection, that such participation by the bonding company *could* have been arranged, and the same *was* done in this very case by the Fidelity and Deposit Company, where the express terms of the bond given by it provided that it should have immediate subrogation; but a provision in a bond, accepted by the depositor is one thing, and the application for a bond containing indemnity provisions, with which the depositor has no concern whatsoever, is an entirely different thing.

It is thus believed that in reason and upon principle, the Centropolis decision is erroneous. That court seems to cite no cases in support of its decision with reference to the indemnity agreement, except upon the general principle of "relation back," although it did recite that the surety company in the presentation of its argument relied upon certain cases, the principal ones of which were U. S. Fidelity and Guaranty Co. *vs.* Carnegie Trust Company, 164 N. Y. Sup., 92; 221 New York, 646; 117 Northeastern, 1086, and American Surety Company of New York *vs.* National Bank of Barnesville, 17 Fed. (2), 942. The court did not

discuss these cases. Brief comment upon them here is helpful.

In the case of U. S. Fidelity and Guaranty Company *vs.* Carnegie Trust Company, *supra*, the surety was allowed its indemnity claim with the right of dividends thereon, on the theory that the indemnity contract created a debtor and creditor relation, but the court cited no cases in support of its position. The question of whether or not dividends could be paid thereon to the detriment of the other creditors does not seem to have been passed upon, however, the court stating in that connection:

> "It is not necessary to determine whether or not the claim of the plaintiff can be allowed in such a way as to diminish the dividends which would otherwise accrue to the bankruptcy creditors. It is contended that such effect cannot be given, because it would violate the spirit of the guaranty. The Special Term has so held, and has made full provision for the protection of the bankruptcy creditors in the judgment appealed from, and from this judgment the plaintiff has taken no appeal."

In the case of American Surety Company *vs.* National Bank of Barnesville, *supra*, in the District Court for the Southern District of Ohio, the court specifically denied the surety the right of subrogation, the depositor not having been paid in full, and in the face of its reasoning sustaining its position in that respect, allowed the surety company an indemnity claim for the amount of penalty paid by it under its bond, based

upon indemnity provisions in the application, and directed that the receiver deduct the amount of said indemnity claim from the claim of the depositor and recover from the depositor the dividends paid by it upon said $6,000. The court thus denied the claim of subrogation and immediately gave subrogation for the full amount, in the manner indicated. It seems apparent that the case is not entitled to weight as an authority.

> Maryland Casualty Company *vs.* Fouts, 11 Fed. (2), 71.

This case, from the Circuit Court of Appeals, Fourth Circuit, holds contrary to the Centropolis case and denies the right of a surety either by subrogation or by way of indemnity, to participate in the assets of the bank until the depositor is paid in full.

The Surety Company gave the Treasurer of the State of North Carolina a depository bond of $50,000, with the Peoples National Bank of Salisbury, as principal. The application of the bank for the bond also contained indemnity provisions. The bank failed, the surety company paid its $50,000 under the bond, and the depositor remained unpaid in full. The surety claimed: (1) the right to a claim of $50,000 under its indemnity agreement, and (2) right of subrogation by reason of payment of $50,000. The district court held:

> (72) "That the plaintiff, Maryland Casualty Company, is not entitled to receive any dividends from the defendant, J. E. Fouts, receiver of the People's National Bank of Salisbury, until intervener, B. R. Lacy, Treasurer of the

State of North Carolina, has received his entire deposit, and that the said plaintiff, Maryland Casualty Company, after payment has been made to the said B. R. Lacy, Treasurer of the State of North Carolina, of the full amount of his deposit, with interest, is entitled to be subrogated to the rights of said State treasurer to, and to receive from the said J. E. Fouts, receiver, such additional dividends as may be declared by him upon the sum of $50,000, penalty of the bond executed by the Maryland Casualty Company and the amount paid by it thereon to the State treasurer. * * *"

"* * * *That the plaintiff is not entitled to recover of the defendant, J. E. Fouts, receiver of the People's National Bank of Salisbury, on its indemnity agreement with the said bank*, and that the said Maryland Casualty Company is only entitled to subrogation to the rights of B. R. Lacy, Treasurer of the State of North Carolina, as hereinbefore set forth." (Italics inserted).

In disposing of the issue, the circuit court of appeals said:

(p. 72) "The determination of appellant's rights and liabilities depend upon the effect and meaning of the undertaking given by it to indemnify the State on account of its money deposited in the bank, and the agreement of the bank with the appellant surety company to indemnify it on account of the indemnity bond.

"The right of subrogation for the amount paid by appellant to the State depends upon whether the sum paid was in full of the liability

on the indemnity bond, or only on account thereof. If appellant was not lawfully entitled, out of the general assets of the defaulting bank, to be substituted to the rights of the State, whose indebtedness it paid, under its indemnity bond, to the extent of $50,000, then no right of subrogation existed in its behalf. To allow the appellant to assert such indebtedness, based upon its alleged claim as a creditor for the amount paid by it under its bond of indemnity to the State, and claimed to be in full of such liability, would be to permit the assertion of a claim in behalf of a guarantor against those it undertook to indemnify, in advance of the latter being paid in full the amount due them.

"The penalty of the bond in this case, it is true, was $50,000, and, subsequent to the bank's failure, the amount of the penalty was paid by the surety; but the whole obligation to the State was by no means extinguished. On the contrary, there remained a balance of $39,579.14 due. The condition of the indemnity bond was to pay upon demand *all* money deposited in said bank, no limitation in amount being placed thereon, as set forth in full in the provision of the bond hereinbefore given. Manifestly, the surety therein could not assert a claim, either by way of subrogation or *otherwise*, on account of what it saw fit to pay on its bond indemnity, as an admitted liability, leaving *unpaid* such portions thereof as it saw fit not to settle."

(p. 74) "* * * Appellant's position is purely contractual, and until it has met its liability, and the State has been paid in full, as well for the excess deposits of $39,579.14, as for the penal amount of the indemnity bond, it has no right, by subrogation or otherwise, in a case

> like the present one, to call upon others to share its burdens."

Some parts of the discussion by the court may at first seem to suggest that the court was considering only the subrogation aspect of the case, but the court denied relief either by way of subrogation "or otherwise," and the above quoted extracts clearly indicate that both questions were before it and were disposed of, and in closing the court said:

> "The decree of the district court is plainly right and should be affirmed with costs."

This phase of the question, from the standpoint of indemnity right as distinguished from subrogation, does not seem to have been passed upon by the courts, either State or Federal, other than above indicated, with the exception of one case in the Supreme Court of Michigan. In Commissioner of Banking *vs.* Chelsea Savings Bank, 161 Mich., 691; 125 Northwestern, 424, the surety contended that the agreement of indemnity given to it by the bank entitled it "to stand as a creditor of the bank and receive its share of any dividends paid." In denying this claim, the court said:

> "Its undertaking is that its principal shall repay all moneys deposited, and it must be construed as a security for the whole debt. It is conceded, and the authorities cited by counsel for the intervener, sustain the concession and the general rule, that in such a case the guarantor is not entitled to a share of the dividends which are declared and paid in reduction of the whole debt."

Also see the cases of Springfield National Bank *et al. vs.* American Surety Company, 7 Fed. (2d), 44, and Fidelity and Deposit Company of Maryland *vs.* Robinson, 7 Fed. (2d), 371, denying the right of a surety to set off a claim under its indemnity contract in connection with a depository bond, against its liability to the receiver of the bank upon a fidelity-employees bond given to the bank before its suspension; and the case of U. S. Fidelity and Guaranty Company *vs.* Wooldridge, 268 U. S., 234, upon which such cases are based.

Without going further with the discussion in this connection, it is evident that a direct conflict exists between the Circuit Courts of Appeals of the Fourth and Eighth Circuits on this important question, and it is imperative that this Honorable Court determine for the guidance of the Comptroller of the Currency the lawful course to pursue in such cases.

II.

The Court Erred in Holding That the Matters in Issue Were Not Res Judicata.

In the response of the National Surety Company to the interpleader in the first case (Record, p. 87), the Surety Company based its claim both upon subrogation and upon its indemnity contract, and, as already indicated, in Prayer No. 4, asked for subrogation, and in Prayer No. 5 asked for the allowance of its claim upon the indemnity contract (Record, pp. 91-92). The answer of the American Surety Company to the claims of the National Surety Company (Record, pp. 95-98),

denied the contentions of the National Surety Company and placed them in issue. That the indemnity agreement was thus put in issue in the trial court is recognized by the circuit court in the instant case (National Surety Company *vs.* Jenkins, 18 Fed. (2nd), 707, 710), but the circuit court of appeals in the instant case took the position that the indemnity agreement was not a proper basis of claim to be put forward in connection with the subrogation agreement, and that it was not actually litigated and

> "was not necessarily determined by the decree in the former suit * * * although it was put in issue by the pleadings" (p. 710).

The National Surety Company, however, evidently considered, in the first case, that the indemnity contract was still in issue and in litigation, inasmuch as its eighth assignment of error (Record, pp. 136, 137, 138), shows strenuous contention in that respect, as follows:

> "* * * and for the further reason that the undisputed evidence shows said National Surety Company has a valid claim for reimbursement from the receiver of said bank as provided for in said application made by said bank for said bond, in which application said National City Bank promised to indemnify and hold said National Surety Company harmless from any loss on account of its execution of said bond for said bank, and that if said American Surety Company has any such right or claim upon the assets or funds in the hands of said receiver, it is subsequent and inferior to the

> rights of this defendant, National Surety Company * * * and that the *legal* right of the National Surety Company to reimbursement from said bank and the receiver thereof, by reason of said application executed by said bank and to the *equitable* right of direct subrogation against the said bank and its receiver, as the principal upon said bonds is superior to any alleged right of said American Surety Company against said bank or its receiver and the funds in his hands as such receiver." (Italics inserted.)

The trial court, in the first case, as already indicated, denied relief upon either ground, and the circuit court of appeals, in that case (National Surety Company *vs.* Salt Lake County, 5 Fed. (2nd), 34, 35), in stating the issue which was before the trial court and the disposition of the same by the trial court, said as follows:

> "The single question is whether, upon the facts stated, the law and the equities give these remaining dividends and proceeds of the Crystal Lake Farms bonds, after the county has been paid in full, to the appellant, National Surety Company, or to the appellee, American Surety Company. The learned trial court held that the American Surety Company is entitled to all funds derived and to be derived from such dividends and bonds, till it shall have been paid the sum of $223, 362.15, the total sum paid by it on its fidelity bond, including interest, and with interest on the basic sum, at the rate of 8 per cent, from February 29, 1924, and that the appellant, National Surety Company, shall be postponed in participation in such funds till the

appellee, American Surety Company, shall have been paid in full."

This matter was clearly summarized by the district court in the instant case in the following language:

> "It seems to me clear, notwithstanding the theory relied upon by the plaintiff in this action to distinguish it from the former case, that the subject matter of the litigation is the same and that the former case has disposed of the subject matter definitely and that nothing is left to be disposed of in this case otherwise than therein determined.
>
> "In that case the circuit court of appeals affirmed the judgment of this court giving priority of payment to the American Surety Company of the amount due it through Mr. Grosebeck, before the plaintiff in this case can be paid anything.
>
> "Now you cannot change that decree by changing the theory of your cause of action. The subject matter of this obligation has been disposed of." * * * (R., 210.)
>
> "As already said, by the decree in the former suit, no funds are available for the liquidation of the plaintiff's indebtedness until Mr. Grosebeck, as treasurer, or his guarantor, the American Surety Company, has been made whole. That judgment must stand." (R., 211).

It would thus seem that inasmuch as the parties were the same in both cases, and the indemnity contract was a basis of claim in both cases, the adjudication in the former case, denying right of recovery, was binding and could not be relitigated in the instant case.

As said in Commercial Electric Supply Co. *vs.* Curtis, 288 Fed., 657, 660 (certiorari denied, 363 U. S., 709):

> "A final decree or judgment of a court between parties to a suit therein, of whom and concerning the subject matter of which it (the court) has jurisdiction, renders not only every claim and defense which they made and obtained a decision of, but also every claim and defense that they might have made and that the court might have decided in that suit, *res adjudicata* between them" (p. 660).

In Wong Sun *vs.* Fluckey, 283 Fed., 989, 991, the court said:

> "According to the general principles of the doctrine of *res adjudicata*, a former judgment is a bar not only as to matters *actually* argued and *decided*, but also as to all other matters which *might have been* put in issue, argued and *decided*." (Italics inserted.)

Conclusion.

It is respectfully submitted that the decision of the lower court in the instant case was erroneous and the petition for writ of certiorari should be granted.

Respectfully submitted,

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